



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 13, 1995

Mr. Geoffrey S. Connor
Assistant Commissioner
Legal Affairs and General Counsel
Texas Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

OR95-1217

Dear Mr. Connor:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29783.

The Texas Department of Agriculture (the "department") received a request for its file on Southwest Mariculture, Inc. ("Southwest"). Southwest is a corporation that has participated in the loan guaranty program of the Texas Agricultural Finance Authority (the "Authority"). The department contends that portions of the requested information are excepted from required public disclosure under sections 552.101, 552.104, 552.107(1), 552.110, and 552.111 of the Government Code.

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified those parties of this request. See Gov't Code § 552.305 (permitting interested third party to submit to the attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that section 7(c) of V.T.C.S. article 6252-17a, predecessor provision of § 552.305 of the Government Code, permits a governmental body to rely on an interested third party to raise and explain applicability of an exception in the Open Records Act in certain circumstances). The third parties assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.104, and 552.110 of the Government Code. The third parties also state that they submitted information to the department with the understanding that such information would remain confidential.

Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory or by judicial decision. Information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential. *See* Open Records Decision No. 479 (1987). Furthermore, governmental bodies may not agree to keep information confidential except where specifically authorized to do so by statute. *See* Open Records Decision No. 444 (1986). Thus, the fact that the third parties here understood that the department would keep confidential the information they submitted does not effect the public release of that information under the Open Records Act.

You say the requested information contains social security numbers and income tax return information. You state that since prior open records decisions have resolved the issue of the public disclosure of social security numbers and income tax return information, the department will withhold from disclosure all such numbers and tax information. Because you have not submitted this information to our office for review, we do not address the release of such information.

The requested information contains numerous documents containing financial information relating to individuals. Section 552.101 applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

Background financial information about a person, that is, information about an individual's financial status and past financial history, is generally excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See* Open Records Decision No. 545 (1990) at 4. Therefore, the department must not release such information. However, we believe the public has a legitimate interest in some of the financial information. In addition, some of the "background information" relates to a corporation, rather than an individual. Common-law privacy does not protect from disclosure the background information of a corporation. *See* Open Records Decision No. 620 (1993). We have marked the portions of the documents that the department must withhold from required public disclosure based on section 552.101 in conjunction with the common-law right to privacy.

Section 552.104 of the Government Code reads as follows:

Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interest of a governmental body in situations such as competitive bidding and requests for proposals in which the governmental body may wish to withhold information to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) at 8. A governmental body may claim section 552.104 to withhold information to maintain its competitive advantage in the marketplace if the governmental body is specifically authorized by law to engage in such competition. *See* Open Records Decision No. 593 (1991) at 4. We conclude that the department has not demonstrated that it is authorized to engage in marketplace competition. *See id.* Accordingly, the department may not withhold any of the requested information pursuant to section 552.104 of the Government Code.

Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Although section 552.107(1) excepts information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communication; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14. Furthermore, this exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990).

You have enclosed two letters from a law firm that you say serves as counsel for the Authority. We have marked the portions of these letters that are protected from required public disclosure under section 552.107(1) of the Government Code. The remaining portions of these letters must be released.

Section 552.110 provides as follows:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure.]

Neither you nor the third parties assert that the requested information contains trade secrets. Nor do you or the third parties contend that the information at issue is privileged or confidential by statute or judicial decision. The fact that the disclosure of financial information may cause substantial harm to the competitive position of the person or company that supplied the information is not sufficient to keep information private.

See Open Records Decision No. 592 (1991). Thus, the department may not withhold the requested information pursuant to section 552.110 of the Government Code.

Finally, you raise section 552.111 of the Government Code, which excepts from required public disclosure

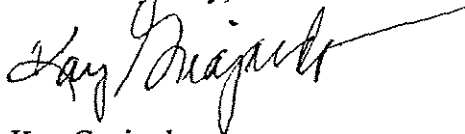
an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See Open Records Decision No. 615 (1993).* This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

You have not indicated which documents the department seeks to withhold under section 552.111. In your second letter to this office which accompanied the requested information and in which you provided a more detailed briefing, you did not raise section 552.111. Consequently, we conclude that the department may not withhold any of the requested information based on section 552.111 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 29783

Enclosures: Marked documents

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